No. 98-1698

In the Supreme Court of the United States

RICARDO RENTERIA-PRADO, PETITIONER

v.

KENNETH L. PASQUARELL,
DISTRICT DIRECTOR, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 8 U.S.C. 1252(g) (Supp. III 1997), which deprives the district courts of jurisdiction over any claim "arising from the decision or action by the Attorney General to * * * execute removal orders against any alien," refers solely to removal orders entered after April 1, 1997, the general effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, or whether it also covers claims arising out of the execution of exclusion and deportation orders entered under pre-IIRIRA law.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-6) is unreported. The opinion of the district court (Pet. App. 7-10) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1999. The petition for a writ of certiorari was filed on April 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico who first sought admission to the United States on April 15, 1985, presenting an immediate relative immigrant visa. The examining officer was unable to conclude, however, that petitioner was "clearly and beyond a doubt" eligible to enter the U.S. as an immigrant, see 8 U.S.C. 1225(b) (1982). Petitioner gave a sworn statement that he had paid his spouse, Arlene Vidales, a United States citizen, $500 to marry him, and had promised to pay her another $500 after he was admitted as an immigrant. The Immigration and Naturalization Service (INS) commenced exclusion proceedings against petitioner based on his failure to have a valid unexpired immigrant visa and his having obtained a visa by fraud or misrepresentation of a material fact, and paroled him into the country so that he could attend an exclusion hearing before an immigration judge (IJ). See Court of Appeals Record Excerpts (C.A. R.E.) 284-285.

On October 10, 1985, an IJ found petitioner excludable as charged. Although petitioner and Vidales asserted at the exclusion hearing that their marriage was *bona fide*, the IJ found that testimony to be not credible, and sustained the INS's allegation that petitioner and Vidales had entered into a marriage ceremony for the sole purpose of evading the immigration laws. C.A. R.E. 298-299. The IJ entered an order excluding and deporting petitioner from the United States. C.A. R.E. 293.

Petitioner appealed the IJ's exclusion order to the Board of Immigration Appeals (BIA). In late 1985, while his appeal to the BIA was pending, petitioner left the United States and then entered again unlawfully, without inspection by an immigration official. On May

7, 1987, petitioner divorced Vidales. On July 11, 1987, he married Emerita Elizalde, a United States citizen. The couple have two children who are United States citizens. Pet. 3.

On August 16, 1990, the BIA dismissed petitioner's appeal, sustaining the IJ's determination that petitioner's previous marriage to Vidales was a sham. C.A. R.E. 284-289. On December 24, 1990, petitioner's current spouse petitioned the INS on behalf of petitioner for an immigrant visa. The INS approved that petition, and forwarded it to the U.S. consulate in Ciudad Juarez, Mexico. Petitioner traveled to Ciudad Juarez to meet with a U.S. consular officer. The consular officer, however, found petitioner inadmissible under 8 U.S.C. 1182(a)(19) (1988) because of his previous attempt to immigrate based on a fraudulent marriage. Petitioner then returned to the United States without inspection. C.A. R.E. 141-143, 191.

2. On September 30, 1996, Congress enacted into law the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA comprehensively revised the Immigration and Nationality Act (INA), and in particular abolished the INA's old distinction between deportation and exclusion proceedings, replacing them with a new unitary form of proceeding, known as "removal." See IIRIRA § 304(a), 110 Stat. 3009-587 to 3009-597; 8 U.S.C. 1229a (Supp. III 1997). IIRIRA also added a new provision to the INA designed to expedite the removal of aliens who return illegally to the United States after having been previously ordered removed. Under that provision,

> [i]f the Attorney General finds that an alien has reentered the United States illegally after having

> been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5) (Supp. III 1997). Thus, if an alien has been ordered removed, leaves the United States (either voluntarily or pursuant to a warrant of removal), reenters the United States illegally, and is apprehended in the United States, the Attorney General need not commence another round of removal proceedings against the alien, but may simply reinstate the prior removal order and execute it once more.

On July 18, 1997, petitioner was apprehended by the INS. On July 22, 1997, the INS found that petitioner had reentered the United States after having been ordered removed and having departed. It therefore reinstated petitioner's prior exclusion order. C.A. R.E. 301, 303. Petitioner requested that the INS initiate full removal proceedings against him under 8 U.S.C. 1229 and 1229a (Supp. III 1997), so that he could apply for discretionary cancellation of removal under 8 U.S.C. 1229b (Supp. III 1997). The INS declined to do so.

3. On December 19, 1997, petitioner filed suit in district court, alleging that the INS had no authority to remove him from the United States except by instituting full removal proceedings under Section 1229a. Petitioner argued that Section 1231(a)(5), which provides for the reinstatement of a prior removal order against an alien who was ordered removed, left the country under an order of removal, and then reentered illegally, permits only for the reinstatement of removal orders

entered after April 1, 1997, the general effective date of IIRIRA, and does not permit the reinstatement of exclusion or deportation orders entered before that date. See C.A. R.E. 206-249.

The government argued that Section 1231(a)(5) does provide for the reinstatement of pre-IIRIRA exclusion and deportation orders. The government pointed out that Section 309(d)(2) of IIRIRA, 110 Stat. 3009-627, expressly provides that, "[f]or purposes of carrying out the [INA], as amended by [Subtitle A of Title III of IIRIRA,] * * * any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." Section 1231(a)(5) was added to the INA by Subtitle A of Title III of IIRIRA. See IIRIRA § 305(a)(3), 110 Stat. 3009-599. Therefore, the government argued, Section 1231(a)(5)'s provision for the reinstatement of an "order of removal" is deemed to include an "order of exclusion and deportation" entered under pre-IIRIRA law.

For similar reasons, the government argued that the district court lacked jurisdiction over petitioner's claim under 8 U.S.C. 1252(g) (Supp. III 1997), which was also added to the INA by Subtitle A of Title III of IIRIRA. See IIRIRA § 306(a)(2), 110 Stat. 3009-612. Section 1252(g) provides that, in general, the district courts have no jurisdiction "to hear any cause or claim * * * arising from the decision or action by the Attorney General to * * * execute removal orders against any alien." Moreover, IIRIRA expressly made Section 1252(g) immediately applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." IIRIRA § 306(c)(1), 110 Stat. 3009-612. Therefore, the government argued, because petitioner's claim

arose out of the decision or action by the Attorney General to execute the prior exclusion order entered against him, which under Section 309(d)(2) of IIRIRA was deemed also to be a "removal" order within the meaning of the amended INA, the district court lacked jurisdiction to entertain the claim.

The district court agreed with the government and dismissed petitioner's complaint. Pet. App. 7-10. The court first ruled that it lacked jurisdiction over petitioner's claim because of Section 1252(g). The court explained that, under Section 1252(g), except as otherwise provided in Section 1252 itself, "no court shall have jurisdiction on a claim arising from the execution of removal orders against an alien. As [petitioner's] present claims arise from a decision to execute a removal order against him, this [c]ourt's jurisdiction to review is eliminated." *Id.* at 8. The court also concluded (*ibid.*) that "the exclusion order was properly reinstated" in any event, and that petitioner "has no statutory right to be placed in removal proceedings pursuant to" Sections 1229 and 1229a. The court noted (*id.* at 8-9) that Congress, in Section 1231(a)(5), "allowed the INS to reinstate the order of exclusion as to [petitioner]," and that Congress further provided in Section 309(d)(2) of IIRIRA that "for purposes of carrying out the act, any reference to an order of removal is to be deemed as including a reference to an order of exclusion. * * * No further administrative hearing is necessary." Finally, the court stated that petitioner "received all due process to which he was entitled." *Id.* at 9.

The court of appeals affirmed. Pet. App. 1-6. It concluded that Section 1252(g) divested the district court of jurisdiction to entertain petitioner's challenge to the reinstatement of his exclusion order. In so holding, the court of appeals first rejected (*id.* at 4-5) petitioner's

contention that Section 1252(g)'s bar of jurisdiction over claims based on the Attorney General's execution of "removal orders" applies only to orders of removal entered in removal proceedings under Section 1229a, as added by IIRIRA, and not also to orders of exclusion and deportation entered under pre-IIRIRA law. That argument, the court observed, is directly contrary to the plain language of Section 309(d)(2) of IIRIRA, which expressly defines the term "removal order" to include an order of exclusion and deportation. *Id.* at 4.

The court then held that petitioner's claim fell within the scope of Section 1252(g), as it was a challenge to the execution of the deportation order against him. Pet. App. 5. Petitioner's goal, the court noted, "is to invalidate the reinstated removal order and to require the INS to place him in removal proceedings so that he can seek relief from the removal order. His claims are 'connected directly and immediately with a "decision or action by the Attorney General to . . . execute removal orders."'" *Ibid.* (quoting *Humphries* v. *Various Fed. USINS Employees*, 164 F.3d 936, 943 (5th Cir. 1999), and 8 U.S.C. 1252(g) (Supp. III 1997)). Thus, "[b]ecause [petitioner's] claims arise from a decision to execute an order of removal, neither the district court nor this court have [*sic*] jurisdiction to review his claims." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that petitioner's challenge falls within the scope of 8 U.S.C. 1252(g) (Supp. III 1997), which bars jurisdiction (except as specifically provided elsewhere in Section 1252) over claims arising from "the decision or action by the Attorney General to * * * execute removal orders." In addition, the court of appeals' decision is unpub-

lished, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

Section 1252(g) precludes the courts, except as elsewhere provided in Section 1252 itself, from taking jurisdiction over "any cause or claim * * * arising from the decision or action by the Attorney General to * * * execute removal orders against any alien." At the outset, we note that the only dispute between the parties about the application of Section 1252(g) to this case is whether petitioner's exclusion order constitutes a "removal order[]" within the meaning of that Section. Petitioner does not dispute in this Court that the decision by the Attorney General to reinstate, and thereafter to execute, that exclusion order constitutes a "decision or action by the Attorney General to * * * execute" that order. See also Pet. App. 5 (noting that petitioner's claims are "connected directly and immediately" with the Attorney General's decision to execute the exclusion order against him). Therefore, this case raises no issue concerning the application of the Court's recent decision in *Reno* v. *American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936 (1999) (*AADC*), which gave a more narrow construction to the scope of Section 1252(g) than the one advocated by the government in that case.

Petitioner's argument, rather, is that, because Section 1252(g) refers only to the decision of the Attorney General to execute "removal" orders, it excludes from the jurisdictional bar claims arising from her decision to execute an exclusion order entered before the comprehensive changes to the INA enacted by IIRIRA took full effect. That argument, however, is contrary to the plain language of Section 309(d)(2) of IIRIRA, which provides that, for purposes of carrying out the INA, as

amended by Subtitle A of Title III of IIRIRA (which includes Section 1252(g)), "any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." Accordingly, the "reference" in Section 1252(g) to orders of removal, barring jurisdiction over challenges to the execution of such orders, also includes orders of exclusion and deportation. And, as the court of appeals noted (Pet. App. 4), other courts of appeals have held that Section 1252(g) bars jurisdiction over challenges to the execution of deportation orders entered under pre-IIRIRA law, including those challenges that were pending in the courts on the date that Section 1252(g) took effect. See *Auguste* v. *Reno*, 152 F.3d 1325, 1329 (11th Cir. 1998); *Ramallo* v. *Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), cert. denied, 119 S. Ct. 1139 (1999).

Petitioner attempts to make several textually based arguments to show that Section 309(d)(2) does not apply to deportation orders entered before April 1, 1997. Those arguments are without merit. First, petitioner points out (Pet. 9) that Section 309(a) of IIRIRA provided that, except as otherwise provided in that statute, the amendments made by Subtitle A of Title III of IIRIRA were to take effect on April 1, 1997. See 110 Stat. 3009-625. Therefore, petitioner argues, Section 309(d)(2)'s "deeming" of removal orders to include exclusion and deportation orders applies only to removal orders entered under the new removal proceedings established by IIRIRA, and to deportation and exclusion orders entered after April 1, 1997, in proceedings that were opened before that date. But there is no evident reason why Congress would have wanted to treat deportation and exclusion orders entered before April 1, 1997, differently from those entered after that

date, and nothing in IIRIRA compels the conclusion that Congress intended to treat those two classes of orders differently for present purposes.

Even if Section 309(d)(2) did not take effect until April 1, 1997, nonetheless, once it took effect, its "deeming" of any reference to removal orders to include deportation and exclusion orders applied to bar jurisdiction under Section 1252(g) over challenges to the execution of *all* deportation and exclusion orders, including those that had been previously entered. Once IIRIRA came into effect on April 1, 1997, Section 1252(g) applied thereafter to all pending cases, unlike the other subsections of Section 1252, which applied only to removal proceedings commenced after that date. See *Lalani* v. *Perryman*, 105 F.3d 334, 336 (7th Cir. 1997). Moreover, Congress expressly provided that Section 1252(g) "shall apply *without limitation* to claims arising from *all* past, pending, or future exclusion, deportation, or removal proceedings." IIRIRA § 306(c)(1), 110 Stat. 3009-612 (emphasis added). Accordingly, after April 1, 1997, Section 1252(g) barred district court jurisdiction over all pending cases, including those involving previously entered deportation and exclusion orders. Especially since this case was not even filed until after April 1, 1997, the lower courts correctly concluded that Section 1252(g) deprived them of jurisdiction to hear petitioner's challenges.

Petitioner also points out that Congress did not limit Section 1252(g)'s jurisdictional bar to claims arising from the decision or action of the Attorney General to "commence removal proceedings" or "adjudicate removal cases," but rather barred jurisdiction over any action to "commence proceedings" or "adjudicate cases," which he reads as a specific and pointed decision to include pre-IIRIRA deportation and exclu-

sion proceedings and cases. Therefore, petitioner argues, Congress's use of the term "removal" only with reference to jurisdiction over challenges to removal *orders* has the significance of limiting the jurisdictional bar to challenges to removal orders, rather than pre-IIRIRA exclusion and deportation orders. Pet. 8, 11. That argument, however, is impossible to square with the language of Section 306(c)(1), which made Section 1252(g) applicable "without limitation" to claims arising from *all* "past, pending, or future exclusion, deportation, or removal proceedings." Under petitioner's construction, Section 1252(g) would not apply to decisions to execute past exclusion orders, and therefore it would not apply "without limitation" to all "past * * * exclusion * * * proceedings."

Moreover, Congress's use of the term "removal" in Section 1252(g) to modify "orders," and not "proceedings" and "cases," is more readily explained in a different way. As the title of Section 1252 ("Judicial review of orders of removal") makes clear, the principal subject matter of that Section is judicial review over the conduct and outcome of removal proceedings (including, in Section 1252(g), deportation and exclusion proceedings). It was unnecessary for Congress to use the term "removal" to modify "proceedings" and "cases," because it is obvious from the context that the terms "proceedings" and "cases" refer, at least principally if not exclusively, to removal proceedings and cases. The same would not necessarily have been true, however, if Congress had not modified "orders" with the term "removal." In removal proceedings, immigration judges enter many kinds of orders, including orders that Congress might not have intended to be covered by Section 1252(g). See *AADC*, 119 S. Ct. at 943 (noting that there are "many other decisions or actions that may be part of

the deportation process" that are not covered by Section 1252(g)); see also, *e.g.*, 8 C.F.R. 3.19 (IJ power to enter custody and bond orders). The use of the term "removal" to modify "orders" makes clear that Section 1252(g) precludes jurisdiction over challenges to decisions to execute *removal* orders, and not necessarily challenges to the execution of every order that an IJ enters in the course of a removal proceeding. (Of course, other doctrines, such as the prohibition against judicial review of interlocutory orders entered by administrative agencies, presumably would preclude review of most such orders until after the entry of a final removal order.)

Petitioner further observes (Pet. 22-23) that, although Congress in IIRIRA generally replaced the terms "deportation" and "exclusion" with the term "removal" (reflecting the general replacement of deportation and exclusion proceedings by removal proceedings), in a few places Congress retained the term "deportation" but added "removal" as well. See 8 U.S.C. 1101(g), 1182(d)(12)(A), 1326(a) (Supp. III 1997). Therefore, petitioner argues, Congress's use of the term "removal" should generally be read to have the meaning only of *removal* proceedings and orders, and not also deportation and exclusion proceedings and orders.

The isolated instances in which Congress retained "deportation" but also added "removal," however, are also explained in a different way. Section 309(d)(2), which deems all references to "an order of removal" to include a reference to an order of deportation or exclusion, applies to the INA as amended by Subtitle A of Title III of IIRIRA. See IIRIRA § 309(d), 110 Stat. 3009-627 ("[f]or purposes of carrying out the [INA], as amended by this subtitle"). The three examples in the

INA to which petitioner refers, where Congress retained use of "deportation," were not substantively amended by Subtitle A of Title III of IIRIRA. Section 1101(g) of Title 8 was not amended at all by IIRIRA, except for the new reference to removal orders. Section 1182(d)(12)(A) of Title 8 was added to the INA by Section 345(a) of IIRIRA, which falls outside Subtitle A of Title III, see 110 Stat. 3009-638, as does Section 324(a) of IIRIRA, which amended 8 U.S.C. 1326, see 110 Stat. 3009-629. Congress may have concluded that, because those provisions of the INA were not amended by Subtitle A of Title III, references to an order of "removal" in those provisions might not be "deemed" to include an order of deportation by operation of Section 309(d)(2). Therefore, Congress might well have concluded that a separate reference to an order of deportation was necessary to ensure that the provisions applied to orders of deportation entered before IIRIRA took full effect on April 1, 1997, as well as orders of removal entered after that date.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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